

June 9, 2021

Commissioner Antonia Urrejola Noguera
President
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

**Re: Concerned Citizens of St. John the Baptist Parish, MC-421-21
Response of the United States to Request for Information**

Dear President Urrejola:

We appreciate the opportunity to provide observations on the request for precautionary measures forwarded to the United States in the above-referenced matter on behalf of Concerned Citizens of St. John the Baptist Parish (“Concerned Citizens”) and Tulane Environmental Law Clinic (“TELC”) (collectively “Petitioners”), which your office transmitted to the United States via a letter dated May 25, 2021.

The United States respectfully submits that the Commission should refrain from requesting precautionary measures in this case because the Commission lacks the authority to require such measures. Moreover, such measures are not warranted in any event for the reasons set forth below.

Lack of competence

The Commission should decline to ~~the request~~ precautionary measures request here because Petitioners have failed to state facts that tend to establish a violation of the American Declaration of the Rights and Duties of Man (“American Declaration”).

As noted in numerous prior submissions, the United States has undertaken a political commitment to uphold the American Declaration, a nonbinding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States (OAS).¹ Article 20 of the Statute of the Commission (“Statute”) sets forth the Commission’s

¹ The United States has consistently maintained that the American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on member states of the OAS. U.S. courts of appeal have independently held that the American Declaration is nonbinding and that the Commission’s decisions do not bind the United States. *See, e.g.*, *Garza v. Lappin*, 253 F.3d 918, 925 (7th Cir. 2001); *accord, e.g.*, *Flores-Nova*

Commented [MM1]: Should be first written as “Inter-American Commission on Human Rights (“Commission”)

Commented [FKC2R1]: I will make this change.

Commented [MM3]: Is this a jurisdictional issue?

Commented [FKC4R3]: This is explained in the section below.

Commented [MM5]: As exemplified in the *Mossville Case*, maybe the heading here should be **Admissibility**, which would then follow by two subheadings: A. Jurisdiction, should address the competence argument; and followed by B. Exhaustion of Domestic Remedies?

Commented [FKC6R5]: This matter is at a different stage than the *Mossville* filing I think you might be looking at. This is a request for precautionary measures so the Commission won’t necessarily make an admissibility determination when considering this request.

powers that relate specifically to OAS member States that, like the United States, are not parties to the legally binding American Convention, including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make nonbinding recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted.

Here, Petitioners have failed to show a breach of duty under the American Declaration. In asserting that “the U.S. and Louisiana governments violate internationally recognized human rights by failing to protect against chloroprene exposure in St. John,” Petitioners allege, without further explanation, “violations” of Articles I and XI of the American Declaration. These allegations appear to be based on an extraordinarily and erroneously expansive interpretation of state commitments under those articles and are unsupported by the text of those articles.

Failure to Exhaust Domestic Remedies

The Commission should decline ~~the to request~~ precautionary measures request in this matter because Petitioners have not satisfied their duty to demonstrate that they have “invoked and exhausted” domestic remedies under Article 20(c) of the Statute and Articles 25(6) and 31 of the Commission’s Rules of Procedure,² and in fact have simultaneously initiated an administrative petition before the Environmental Protection Agency (“EPA”) on claims nearly identical to those in their request for precautionary measures. The Statute requires the Commission to “verify, as a *prior condition* to the exercise of the powers granted under [Article 20(b)], whether the domestic legal procedures and remedies of each member State not a Party to the Convention have been duly applied and exhausted.”³ The Commission has repeatedly emphasized that a petitioner has

v. Attorney General of the United States, 652 F.3d 488, 493–94 (3rd Cir. 2011); In re Hicks, 375 F.3d 1237, 1241 n.2 (11th Cir. 2004). As explained by the U.S. Court of Appeals for the Seventh Circuit in *Garza*, “[n]othing in the OAS Charter suggests an intention that member states will be bound by the Commission’s decisions before the American Convention goes into effect. To the contrary, the OAS Charter’s reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members. The language of the Commission’s statute similarly shows that the Commission does not have the power to bind member states.” *Accord* Commission Statute, art. 20 (setting forth recommendatory but not binding powers). For a further discussion of the U.S. position regarding the nonbinding nature of the American Declaration, see Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988, available at [HYPERLINK "http://www1.umn.edu/humanrts/iachr/B/10-esp-3.html"].

² [Insert FN about other ways that they have not exhausted or other possible avenues for claims. The Petition for Emergency Action and the Petition for Rulemaking filed with EPA by the Concerned Citizens of St. John discussed below also appears to include a request to initiate an investigation of the Louisiana Department of Environmental Quality pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et. seq. (Title VI). Title VI prohibits discrimination on the basis of race, color, or national origin, by programs or activities that receive financial assistance from the EPA. This matter has been referred to EPA’s External Civil Rights Compliance Office.]

³ IACHR Statute Art. 20(c) (emphasis added) (The Commission’s powers listed at Article 20(b) are “to examine communications submitted to it and any other available information, to address the government of any member

Commented [MM7]: Some places, member State capitalizes “State” as is here but for example in footnote 1, “state” is in lower case.

Commented [FKC8R7]: Thanks, I will make this consistent throughout.

Commented [FKC9]: They point to Art I (right to life, liberty and security of person) and Art XI (right to preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources). They do not flesh out their argument at all in their request so I have left this section very high level. I’m open to suggestions on whether we should say more here at this stage.

Commented [FKC10]: This is probably our strongest argument. I have focused to start just on the EPA petition that they filed simultaneously. It would probably be worthwhile to flesh this out with other remedies that could (or are) pursuing. EPA may be best placed to provide more detail here.

Commented [MM11]: Since this is our strongest argument, probably we should make this argument first.

Commented [FKC12R11]: I think we probably still want to make the point about how we don’t believe they have alleged a violation of the American Declaration, as well as set forth our position about the Commission’s competency. Let me know, though, if there are objections to the arguments in the first section.

Commented [FKC13]: I might suggest moving the text in this section to a FN where we are directly discussing that EPA petition they filed. I had envisioned this FN as one that would highlight other domestic remedies they could pursue (so more along the lines of what you inserted in the text on the next page).

Commented [AL14]: Environmental groups (including RISE St. James, another citizen group from the community) have filed petitions for review and petitions for reconsideration of the Miscellaneous Organic NESHAP (MON), a recent rule addressing ethylene oxide. In addition, we have received a complaint challenging our failure to update our review of the Hazardous Organic NESHAP (HON)...

Commented [MT15R14]: They also amended their prior complaint alleging a duty to revisit the CAA 112 general provisions under (d)(6) to add a claim regarding our failure to conduct a timely (d)(6) review of the polymers & resins...

Commented [AL16R14]: We’ve added text to the discussion below of exhaustion of administrative remedies, but the court cases could go here.

Commented [MM17]: We should attach a copy of the referenced “petition” this letter so that the Commission can review, and if we have an EPA response regarding next steps that would be good to attach as well, because the

the duty to pursue and exhaust all available domestic remedies. Consistent with the Statute, with respect to a request for precautionary measures, Article 25(6)(a) of the Rules directs the Commission to take into account “whether the situation has been brought to the attention of the pertinent authorities or the reasons why it would not have been possible to do so.” This provision reflects the exhaustion requirement, a general principle of law, also included at Article 31 of the Rules, which states that, “[i]n order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.”

As the Commission is aware, the requirement of exhaustion of domestic remedies is embedded in the international legal system as a means of respecting State sovereignty. It ensures that the State on whose territory a human rights violation allegedly has occurred has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system.⁴ A State conducting such judicial proceedings has the sovereign right to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before resort may be had to an international body.⁵ The Inter-American Court of Human Rights has remarked that the exhaustion requirement is of particular importance “in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction.”⁶ The Commission has repeatedly made clear that petitioners have the duty to pursue available domestic remedies.⁷

Here, Petitioners filed a Petition for Emergency Action and a Petition for Rulemaking with Environmental Protection Agency (EPA), which covers nearly identical claims, on May 6, 2021. The Petition for Rulemaking is consistent with U.S. administrative law which gives interested parties the ability to petition a federal agency to undertake a rulemaking. Federal agencies must respond to a petition for rulemaking within a reasonable time and any denial of such a petition would be subject to judicial review. 5 U.S.C. § 555(b); 42 U.S.C. § 7604(a). EPA is currently considering all relevant authorities under the Clean Air Act to achieve further reductions in emissions of hazardous air pollutants from the Denka facility. In addition, Petitioners and other parties have filed multiple complaints have been filed in U.S. District Court alleging that EPA has failed to perform an act or duty under the Clean Air Act which is not discretionary with the agency with respect to regulations that apply to the Denka facility, and those cases have not yet been resolved. See, e.g., *Texas Envt'l Justice Advocacy Sys., et al. v. Wheeler/Regan, Civ. Action No. 1:20-cv-3733* (D. D.C.) (filed December 18, 2020); *Environmental Integrity Project et al. v. Regan, Civ. Action No. 1:20-cv-3119* (D.D.C.) (filed October 19, 2020). In addition,

state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it.”).

⁴ See, e.g. Interhandel Case (Switzerland v. United States) [1959] I.C.J. 6, 26–27; Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania), 1939 P.C.I.J., Ser. A/B, No. 76.

⁵ THOMAS HAESLER, THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS (1968) at 18–19.

⁶ Velásquez Rodríguez Case, Judgment of July 29, 1988, ¶ 61, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988).

⁷ See, e.g. Páez García v. Venezuela, Petition No. 670-01, Report No. 13/13, Mar. 20, 2013, Analysis § B(1) & Conclusions, ¶ 35 (finding petition inadmissible for failure to exhaust because petitioner did not avail himself of remedies available to him in the domestic system).

Commented [AL18]: This is an unusual petition, but our position historically has been that we do not have to respond to a 303 petition. There is an unpublished DC from 20 years ago holding that the decision to issue a 303 order is committed to agency discretion. Given that, it would be hard to characterize the 303 petition as a first step in exhausting administrative remedies as EPA's view is likely that we could decline to respond to the 303 petition and St. Johns would have no remedy. The petition for rulemaking, however, is a more standard avenue for seeking relief in this situation and EPA does have an obligation to respond and can be challenged on the reasonableness of our response.

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Commented [FKC19]: Is this something EPA is considering separate from Concerned Citizens' EPA petition or in response to their petition? I think we probably want to focus this paragraph on EPA's response to their petition.

Commented [AL20]: The petitioner doesn't overlap (although the attorneys often do).

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multiple petitions for review challenging a rulemaking addressing the regulation of ethylene oxide and other HAP emissions from facilities such as the Denka facility have been filed, *see Huntsman Petrochemical LLC v. EPA*, No. 20-1414 (D.C. Cir) (petitions for review of *National Emission Standards for Hazardous Air Pollutants (NESHAP): Miscellaneous Organic Chemical Manufacturing (MON) Risk and Technology Review, Fed. Reg. 49,084 (Aug. 12, 2020)*, and members of the St. James community and others have filed a petition for reconsideration of this same rule.

Thus, rather than exhausting domestic remedies prior to bringing the matter before the Commission, Petitioners attempt to pursue both processes simultaneously. In a fundamental misunderstanding of the exhaustion requirement and its purpose of allowing the State the opportunity to first address allegations within the framework of its own domestic legal system, Petitioners argue that, by filing this petition with the EPA, they “have paved the road for the EPA to receive this Commission’s direction.” It would be entirely at odds with the Commission’s stated position on exhaustion for the Commission to intervene and “direct” the EPA on this matter before the EPA has even had the opportunity to consider the petition.

The ~~refore~~, Commission, ~~therefore~~ should decline to recommend precautionary measures in this case because the Petition would be inadmissible for failure to exhaust domestic remedies. The Commission should not permit Petitioners to circumvent the U.S. domestic administrative and court systems by petitioning for precautionary measures before they have exhausted domestic remedies.

Precautionary measures

~~The request for precautionary measures in this matter does not satisfy the requirements of Article 25(1) of the Rules, which provides that precautionary measures “shall concern serious and urgent situations presenting a risk of irreparable harm.” In particular, Petitioners’ argument concerning “urgency” is unavailing. Article 25(2)(b) of the Rules provides that an “urgent situation” refers to a “risk or threat that is imminent and can materialize, thus requiring immediate preventive or protective action.” As Petitioners affirmatively note, the Denka Performance Elastomer Neoprene facility with which their request is concerned has operated in St. John the Baptist Parish since 1969. The possibility of persistence of chloroprene emissions, which have been emitted by the facility for over 50 years, cannot satisfy the exigency required by a showing of “urgency” under Article 25(1) of the Rules; this interpretation would render the “urgency” showing effectively meaningless. Furthermore, Petitioners’ assertion that the EPA’s purported plan to terminate State air quality monitoring in St. John in 2020 renders the situation urgent is belied by Petitioners’ own petition before the EPA, which acknowledges that EPA recently extended the 2020 monitoring program.⁸ In short, Petitioners have not satisfied the requirements of Article 25(1), and thus precautionary measures are not appropriate in this matter.~~

⁸ See Petition for Emergency Action under the Clean Air Act, 42 U.S.C. § 7603 et seq., to Abolish the Imminent and

Commented [FKC21]: Should this be St. John? Or is the St. James community a different community in Louisiana?

Commented [FKC22]: It seems that this text should be moved to a FN and framed as examples of other avenues that the Petitioners could have pursued. Am I understanding this correctly? Note the Petitioners did not some litigation in their request so I just wanted to make sure that EPA had looked closely at that section of the Concerned Citizens’ document to make sure we didn’t need to address any of that here.

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Commented [AL23]: Perhaps “the petition or otherwise take action in response to the myriad matters identified above.”

Commented [LJ24R23]: Agree with Lea’s suggestion.

Commented [FKC25R23]: This works for me.

Commented [MT26]: This entire paragraph risks prejudging any decision EPA may make regarding whether to invoke CAA section 303 to either issue an administrative order or file suit in US District Court to enjoin “imminent and substantial endangerment” under CAA section 303. As the Administrator has delegated to OECA and Regions the authority to initiate such action, OECA and Region 6 should be warned of this risk.

Commented [FKC27R26]: I am fine with eliminating this paragraph entirely.

Commented [FKC28]: I have only really addressed the urgency argument here. Do we want to try to also rebut the argument that this is a “serious situation” (Article 25(2)(a) defines “serious situation” to refer to “a grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the inter-American system.”)? Or that there is a risk of “irreparable harm” (Article 25(2)(c) of the Rules of Procedure provides that “irreparable harm” refers to “injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.”)?

Commented [CM29R28]: We recommend that the U.S. response address only the failure to exhaust domestic remedies. Otherwise, as indicated above, arguments on urgency or irreparable harm will risk prejudging domestic determinations.

Commented [FKC30]: To the extent that we can include an additional section with information about measures/steps the U.S. has taken, it would probably be helpful. However, if this will take some time to put ...

Commented [CM31R30]: Information on domestic actions has been added to the text.

Commented [FKC32R30]: My comment was aimed at whether there was anything we could provide to respond ...

~~W~~Finally, we take this opportunity to reaffirm our longstanding position that the Commission lacks the authority to require that States adopt precautionary measures. We refer the Commission to past submissions, which state the reasons for the U.S. position on precautionary measures in detail.⁹ Because the United States is not a Party to the American Convention, the Commission has only the authority “to make recommendations ... to bring about more effective observance of fundamental human rights.”¹⁰ As such, should the Commission adopt a precautionary measures resolution in the above-captioned matter, the United States will take it under advisement and construe it as recommendatory.

Please accept renewed assurances of my highest consideration.

Sincerely,

Bradley Freden
Interim Permanent Representative

Substantial Danger to St. John the Baptist Parish, Louisiana Residents from Toxic Air Pollution and Petition for Rulemaking under the Clean Air Act, 42 U.S.C. § 7412, to Set Health-Protective Air Toxics Ambient Standards, available at http://earthjustice.org/sites/default/files/files/obj_petition_for_emergency_action_petition_for_rulemaking_05-06-2021_1.pdf (noting that the EPA recently extended the 2020 monitoring program and citing to an April 28, 2021 letter from EPA to High P. Lambert).

⁹ See, e.g., Kadamovas et. al. v. United States, Petition No. P-1285-11, Response of the United States, Sept. 2, 2015, § D, available at [HYPERLINK "https://www.state.gov/documents/organization/258153.pdf"].

¹⁰ Commission Statute, art. 20(b).

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Drafted: L/HRR Katherine Fennell

Approved: USOAS BFreden

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